

## **Kansas Open Meetings Act (KOMA) Guidelines**

**Revision Date: August 26, 2016**

### **I. PURPOSE AND CONSTRUCTION**

#### **A. Public Policy.**

1. It is the public policy of Kansas that meetings be open to the public because “a representative government is dependent upon an informed electorate. . . .” K.S.A. 2015 Supp. 75-4317.

#### **B. KOMA is interpreted liberally and exceptions narrowly construed to carry out the public purpose of the law. *State ex rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 4 (1982) (KOMA enacted for the public benefit and therefore is construed broadly in favor of the public to give effect to its specific purpose).**

### **II. BODIES SUBJECT TO KOMA**

#### **A. Two concurrent requirements found K.S.A. 2015 Supp. 75-4318:**

1. All legislative and administrative bodies, and agencies of the state, and political and taxing subdivisions thereof
2. Which receive or expend and are supported in whole or in part by public funds.

#### **B. Specific Bodies Subject to KOMA:**

1. Political and taxing subdivisions include:
  - a. Cities, counties, townships. AGO 81-288.
  - b. School districts, community colleges. AGO 81-258.
  - c. Watershed districts. AGO 85-161.
  - d. Rural water districts. AGO 89-92; 88-97.
  - e. Drainage districts. AGO 90-69.
  - f. Local historic preservation committees administering K.S.A. 75-2724. AGO 99-22.
2. State agencies and boards, unless otherwise provided. AGO 86-176.

C. Subordinate Groups Subject to KOMA.

1. All subordinate groups, such as boards, commissions, authorities, councils, committees, subcommittees are covered by act if:
  - a. The parent or controlling body meets funding test (*State ex rel., Murray v. Palmgren*, 231 Kan. 524 (1982), and
  - b. Appointed by parent body to weigh options, discuss options, present recommendations or a plan of action.
  - c. It is the nature of the group, not its designation, which determines if it is subject to KOMA. AGO 86-92; *see also* AGOs 86-38; 80-201; 77-53; 76-140; 76-122; 73-235.
  - d. Examples of subordinate groups:
    - 1) School District Advisory Board. AGO 84-81.
    - 2) Fire District Advisory Board. AGO 86-84.
    - 3) Mayor's Commission. AGO 88-25.
    - 4) Appointed grievance committees created by a city to hear employee grievances. AGO 91-31.
    - 5) SRS Drug Utilization Review Board. AGO 93-41.
    - 6) Parental boards under Recreation Commission. AGO 93-73.
    - 7) House and senate conference committees. AGO 93-113.
2. Joint boards subject to KOMA if boards composed of members of different governmental bodies and:
  - a. Appointed by official action, AGO 86-48; or
  - b. Majority of a public body is present. *See also* AGO 84-103 (discussing joint boards under prior law) and 91-150 (discussing presence of public body on joint board under prior law).
3. Meetings of task forces, advisory committees or subcommittees of advisory committees created pursuant to a governor's executive order shall be open to the public. K.S.A. 2015 Supp. 75-4318(a).

- D. Non-profit corporations may be subject to KOMA if the non-profit:
1. Receives or expends public funds;
  2. Is subject to control of governmental unit(s); and
  3. Acts as a governmental agency in providing services or has independent authority to make governmental decisions.
  4. Examples of nonprofit corporations subject to KOMA:
    - a. Area agencies on aging. AGO 79-219.
    - b. Economic Opportunity Foundation, Inc. AGO 84-10.
    - c. McPherson Co. Diversified Services, Inc. AGO 79-284.
    - d. Three Rivers, Inc. AGO 87-143.
    - e. Cowley County Diversified Services. AGO 87-188.
    - f. HELP, Inc. AGO 88-27.
    - g. Southwest Developmental Services, Inc. AGO 94-111.
  5. Examples of nonprofit corporations not subject to KOMA:
    - a. Private nursing homes. AGO 79-221.
    - b. KU and WSU Endowment Associations. AGO 82-172; 80-239.
    - c. Planned Parenthood. AGO 81-253.
    - d. Hutchinson Cosmosphere. AGO 82-256.
    - e. Electric Cooperatives. AGO 85-175; *see also Memorial Hospital v. Knutson*, 239 Kan. 663 (1986) (nonprofit operating a county hospital not subject to KOMA; association leased hospital for \$1.00 per year and received \$228,000 from the county mill levy budgeted by county hospital board of trustees, about 4.8% of total revenues; court held this was a limited receipt of public funds)
    - f. Parsons Chamber of Commerce. AGO 89-149.
    - g. K-10 Corridor Development, Inc. AGO 94-42.

- h. Koch Commission. AGO 94-55.
- i. Kansas Venture Capital, Inc. AGO 94-107.
- j. Mid-America Commercialization, Inc. AGO 94-99.
- k. Consensus Estimating Group – with staff from state agencies. AGO 94-93.
- l. Prairie Village Economic Development Commission. AGO 99-64.
- m. Hesston Area Senior Center. AGO 2001-02.
- n. Sheltered Living, Inc. AGO 2004-34.
- o. KSU Student Senate. AGO 77-174.

E. Bodies and meetings not subject to KOMA:

- 1. Governor-elect transition office (GETO) and Budget Efficiency Savings Team (BEST). *Associated Press v. Sebelius*, 31 K.A.2d 1107 (2003) (entities not subject to KOMA; not created by statute and no authority to act).
- 2. Staff meetings.
- 3. Judicial agencies and bodies. AGO 82-254 (concerning Supreme Court nominating commission).
- 4. Administrative bodies exercising quasi-judicial functions when the body is deliberating matters relating to a decision involving quasi-judicial functions – K.S.A. 2015 Supp. 75-4318(g)(1).
  - a. Examples:
    - 1) Zoning boards. AGO 78-13.
    - 2) City grievance panels. AGO 91-31.
    - 3) Hearing panels. AGO 97-40.
  - b. Only quasi-judicial deliberations may be closed—binding action must be in open meeting. AGOs 91-31; 84-50; 79-225.
  - c. KAPA hearings (K.S.A. 77-501 *et seq.*) are not deemed meetings as defined in KOMA. *See* K.S.A. 2015 Supp. 77-523(f); *see also* K.S.A. 2015 Supp. 75-4318(g); AGO 2014-07 (KAPA only applies to the

extent a board's statutes expressly provide that proceedings under those statutes are governed by KAPA; if KAPA does not apply, then actions of an investigations committee of a state licensing board must be held in accordance with KOMA).

5. Private Organizations.
  - a. Examples:
    - 1) Private/parochial schools. AGO 81-94.
    - 2) Nursing homes. AGO 79-221.
6. Precinct committees. AGO 94-157.
7. Meetings of legislature, if house or senate rules so provide. K.S.A. 2015 Supp. 75-4318(g)(4).
8. Hospital board discussions regarding risk management and peer review exempted from open meeting discussion. AGO 89-42.
9. Prisoner review board when conducting parole hearings or parole violation hearings held at a correctional institution. K.S.A. 2015 Supp. 75-4318(g)(2).

### **III. MEETING**

KOMA only applies when a body subject to the act holds a meeting as defined by law.

- A. "Meeting" defined by K.S.A. 2015 Supp. 75-4317a:
  1. Any gathering or assembly, in person or through the use of a telephone or any other medium for interactive communication,
  2. By a majority of the membership of a public body or agency,
  3. For the purpose of discussing the business or affairs of the public body or agency.
- B. Gathering or Assembly, in Person or Through the Use of a Telephone or other Medium for Interactive Communication.
  1. May conduct meetings by telephone or other medium for interactive communication (video, third parties, Skype, etc.) if do so in compliance with all KOMA requirements, *e.g.*, notice, free access, etc. AGOs 2011-23; 2005-03; 81-268; 80-173; 80-159.

2. Informal discussions before, after, or during recesses of a public meeting are subject to KOMA. *Coggins v. Public Employee Relations Board*, 2 K.A.2d 416, 423, *rev. denied* 225 Kan. 843 (1978).
3. Title of the gathering, *e.g.* work session, is irrelevant if the three requirements of a meeting are met. AGO 90-47; 80-197.
4. “Serial communications” or interactive communications outside of a noticed meeting. K.S.A. 2015 Supp. 75-4318(f).
  - a. Interactive communications in a series or “serial communications” may constitute a meeting subject to KOMA and shall be open if they:
    - 1) Collectively involve a majority of the membership of the public body or agency,
    - 2) Share a common topic of discussion concerning the business or affairs of the public body or agency, and
    - 3) Are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the public body or agency.
  - b. Whether a series of communications constitutes a violation is very fact specific. AGO 2009-22 (no interactive communication where nonmember communicates with a majority of body or agency board and member responds as well as shares response with other members; possibility exists for KOMA violation if there is further interactive communication).

C. Majority of the Membership of the Body.

1. “A majority” means the next whole number greater than one-half the total number of members. AGOs 2002-41; 93-140; 87-152; 87-132; 87-45; 86-110; and 83-174.

D. For the Purpose of Discussing the Business or Affairs of the Body.

1. Binding action or voting is not necessary; discussion is what triggers KOMA. AGO 79-200 (setting out general “common sense guidelines” under prior law).
2. “Meeting” includes all gatherings at all stages of the decision making process. *Coggins v. Public Employees Relations Board*, 2 K.A.2d 416, 423, *rev. denied* 225 Kan. 843 (1978).

3. Social gatherings are not necessarily subject to KOMA; if there is no discussion of the business of the body, one element of a meeting is absent.
4. Retreats and meetings held in private clubs are probably prohibited, especially if site makes it impossible for public to attend without cost. AGOs 82-133 (discussing meeting proposed to be held in Colorado); 80-148.
5. Members attending an educational conference/seminar where items of general interest are discussed (such as a convention of League of Municipalities) are not in violation of the KOMA, as long as the specific business of a body is not discussed. AGO 82-133.
  - a. Opinion focused on the fact that seminars sponsored by the League are open to attendance by the press and public, and are held within Kansas state borders, “thus enhancing its accessibility to the citizens of various Kansas municipalities whose officials are in attendance.”
  - b. CAVEAT: a majority of a public body using such gatherings to discuss the business and affairs of the body among themselves “subverts the purposes of the [KOMA] and must be regarded as a violation. . . .” AGO 82-133.
  - c. When traveling to, attending or returning from such gatherings, advise the members of public bodies to avoid discussing the business or affairs of the body amongst themselves. AGO 82-133.
6. Marriage between two members of a five member city council of a third class city does not violate KOMA, but they should not discuss city business outside open meeting. *See* AGO 87-45 (discussing definition of meeting under prior law which required a majority of a quorum).

#### IV. NOTICE OF MEETINGS

Contrary to popular belief, KOMA does not actually require notice of meetings to be published in advance of the meeting in a paper, on the Internet, etc.

- A. Must request notice of meetings before the public body or agency is required to provide it. K.S.A. 2015 Supp. 75-4318(b). Notice shall be furnished to any person or organization requesting it. AGO 86-133.
  1. Residence of the requester is irrelevant. AGO 81-137.
  2. Notice request expires at the end of the fiscal year; request must be renewed.
    - a. Must first notify of expiration before terminating notice. K.S.A. 2015 Supp. 75-4318(b)(3).

3. Presiding officer has duty to provide notice, but that duty may be delegated. K.S.A. 2015 Supp. 75-4318(c).

B. Form of Request and Notice.

1. Oral request is valid; prosecution is difficult if request for notice is not honored. AGOs 86-133; 81-22; 81-15.
2. Notice given can be written or oral, but must be made individually to the person requesting it. Posting or publication in newspaper is insufficient.
3. A single notice can suffice for regularly scheduled meetings; must notify the requester of any special meetings. AGO 83-173.
4. Cannot charge a fee for providing notice. AGOs 82-141; 81-137.
5. If notice requested by petition, petition shall designate one person to receive notice on behalf of all persons named in petition; notice to designee constitutes notice to all persons named in petition. K.S.A. 2015 Supp. 75-4318(b)(1); AGO 86-133.
6. If notice is furnished to an executive officer of an employees' organization or trade association, that notice shall be deemed to have been furnished to the entire membership of the organization or association. K.S.A. 2015 Supp. 75-4318(b)(2).
7. No time limit is imposed for receipt of notice prior to meeting. Notice must be given in a "reasonable time." Reasonableness depends on the circumstances. AGO 81-15.
8. To establish a violation for failure to provide notice of a meeting there must have been a prior request for notice. A pattern of providing courtesy notice does not create a duty to provide it.
9. Content of notice – must provide the date, time and location of the meeting. K.S.A. 2015 Supp. 75-4318(b).

C. Agendas.

1. KOMA does not require that an agenda be created.
  - a. If a body chooses to create an agenda, the agenda must include topics planned for discussion if known at the time the agenda is prepared. *Stevens v. City of Hutchinson*, 11 K.A.2d 290, 293 (1986).



- b. Agenda may be amended during a meeting unless there is a statute or rule prohibiting amendment. *USD 407 v. Fiske*, 232 Kan. 820 (1983).
  - 2. If agenda exists, it shall be made available to any person requesting it prior to the meeting. K.S.A. 2015 Supp. 75-4318(d); AGO 78-281.
    - a. Agenda not required to be mailed out; can simply be provided by placing the agendas in a public place. AGOs 86-133; 81-15; 79-218.
  - 3. Mandamus proper remedy for board of county commissioners' alleged KOMA violations for failing to include planned discussion topic on agenda for meeting. *Klein v. Johnson County Bd. of County Comm'rs*, 77 P.3d 1009, Syl. ¶ 1 (Court of Appeals, 2003) (unpublished opinion).
- D. Minutes.
  - 1. KOMA does not require minutes except to record motions for executive sessions. AGO 90-47.
    - a. CAVEAT: Local bylaws, ordinances, or policies may require meeting minutes be kept.
  - 2. Not required to disclose publicly draft of minutes before vote to approve such minutes unless draft publicly cited or identified in an open meeting or in the agenda of an open meeting; once cited or identified, draft minutes open. AGO 2013-5.

## V. CONDUCT OF OPEN MEETINGS

- A. All meetings by public bodies and agencies subject to KOMA are required to be open. K.S.A. 2015 Supp. 75-4318(a).
- B. Public attendance and observation only.
  - 1. Any person may attend open meetings. AGO 80-43.
  - 2. KOMA does not require that the public be allowed to speak or to have an item placed on the agenda; "right" is to attend and listen. AGO 2005-03.
    - a. Check local ordinances and policies; these may provide for a public comment portion of the meeting.
    - b. K.S.A. 2015 Supp. 21-6203(a)(2), Disorderly conduct, prohibits "disturbing an assembly, meeting or procession, not unlawful in its character"; violation is a class C misdemeanor.

- C. Recording meetings.
  - a. Use of cameras, photographic lights and recording devices not prohibited in open meeting. K.S.A. 2015 Supp. 75-4318(e).
    - 1. Use subject to reasonable rules designed to insure the orderly conduct of the meeting.
- D. Action.
  - 1. Binding action by public body must be conducted in the open; secret ballots not allowed. K.S.A. 2015 Supp. 75-4318(a).
    - a. The public must be able to ascertain how each member voted. AGOs 93-55; 86-176; 81-106; 79-167.
- E. Meeting location.
  - 1. KOMA does not dictate the location of the meeting, the size of the room, or other accommodation type considerations. Key to openness is whether location is accessible to the public. *Stevens v. City of Hutchinson*, 11 Kan. App. 2d 292, 293 (1986). AGOs 2011-23; 86-153; 82-133; 80-148; 79-253.

## VI. EXECUTIVE SESSIONS

- A. Generally.
  - 1. Public body and agencies must convene an open meeting before it can recess into executive session. K.S.A. 2015 Supp. 75-4319(a); AGO 81-22.
  - 2. “No binding action shall be taken during closed or executive recesses, and such recesses shall not be used as a subterfuge to defeat the purposes of this act. K.S.A. 2015 Supp. 75-4319(c); AGO 91-31.
    - a. May reach a consensus in executive session. *O’Hair v. USD No. 300*, 15 K.A.2d 52, Syl. ¶ 10 (1991).
    - b. A “consensus” may constitute binding action and violate KOMA if a body fails to follow up with a formal open vote on a decision that would normally require a vote. *City of Topeka v. Watertower Place Development Group*, 265 Kan. 148 (1998).
  - 3. Decision to hold executive session is discretionary.
    - a. KOMA never requires an executive session. *See* K.S.A. 2015 Supp. 75-4319(a) (public bodies and agencies subject to the act “may

recess”).

- b. Other laws or policies concerning privacy or confidentiality need to be considered when deciding on the need for executive session.

B. Recessing into executive session.

1. Procedure – K.S.A. 2015 Supp. 75-4319(a) requires specific steps to be taken to recess into an executive session.
  - a. Must be a formal motion, seconded, carried, and recorded in the minutes.
  - b. Three statutory elements to proper motion:
    - 1) Justification for closure,
    - 2) Subject(s) to be discussed, and
    - 3) Time and place the open meeting will resume.
2. The justification and the subject are not the same thing. AGOs 91-78; 86-33; *but see State v. USD 305*, 13 K.A.2d 117 (1988) (privacy rights of non-elected personnel sufficient justification for executive session under KOMA)
  - a. The justification is an explanation of what is to be discussed (without revealing confidential information.)
  - b. The subject is one of the topics allowed for executive session listed in K.S.A. 2015 Supp. 75-4319(b)(1) through (16).
3. Sample Motion:

“Madam Chairman, I move we recess into executive session to discuss disciplinary action against a student in order to protect the privacy of the parties involved. We will reconvene the open meeting in the conference room at 8:30 p.m.”
4. Executive session motions must be recorded in minutes. K.S.A. 2015 Supp. 75-4319(a).
  - a. KOMA does not require other information discussed during the executive session to be recorded. Other minutes for open or executive sessions are discretionary, unless some other law requires them. AGO 90-47.

- b. Minutes must be maintained as a part of the permanent records of the agency or body. K.S.A. 2015 Supp. 75-4319(a).
  - 5. Motion to go into executive session assures the public that the executive session is permissible and in the public interest; may also remind the members of the public body of the limitations upon and purpose served by the executive session discussion. AGO 91-78.
- C. Examples of subjects that may be discussed in an executive session:
- 1. Personnel matters of non-elected personnel. K.S.A. 2015 Supp. 75-4319(b)(1).
    - a. Must be to discuss an individual, not groups. AGO 88-25; 81-39; 80-102; *but see State of Kansas v. USD 305 et al.*, 13 K.A.2d 117 (1988) (discussion of exempt and nonexempt topics in executive session; separation burdensome and impractical, if not impossible).
    - b. Must be to discuss personnel, not policy matters. AGO 2009-21 (employee evaluation may take place in executive session; employee's implementation of policy or directive may be discussed, but not policy or directive itself).
    - c. Purpose of exception is to protect the privacy interests of employees, save personal reputations, and encourage qualified people to remain in government employ. *State of Kansas v. USD 305*, 13 K.A.2d at 119.
    - d. Discussions of consolidation of departments or overall salary structure are not proper topics for discussion under this exception.
    - e. "Personnel" refers to employees of the public agency. AGO 87-10.
      - 1) "Personnel" does not include appointments to boards or committees. AGO 87-10.
      - 2) "Personnel" does not include independent contractors. AGO 2002-28; 87-169.
      - 3) "Personnel" does not include public officers such as workers compensation administrative law judges, workers compensation appeals board members and employment security board of review members. AGO 16-3.
      - 4) KOMA does not give employee a right to be present in the executive session or to force an open session. Other laws or contracts may, however.

- 5) Exception may be used to discuss applicants for employment. AGO 96-61.
2. Consultation with the public body's attorney that would be deemed privileged in the attorney-client relationship. K.S.A. 2015 Supp. 75-4319(b)(2); *see also* K.S.A. 60-426 (Lawyer-client privilege); *Pickering v. Hollabaugh*, 194 Kan. 804 (1965).
  - a. All elements of attorney-client privilege must be present:
    - 1) The body's attorney must be present,
    - 2) The communication must be privileged, and
    - 3) No other third parties may be present. AGO 92-56; 82-247; 82-176; 82-130; 78-303.
  - b. Cannot be used to discuss letter received from attorney if the attorney is not present. AGO 86-162.
  - c. Closed executive session statements of city commission not subject to attorney/client privilege; held discoverable. *Hinsdale v. City of Liberal*, 981 F.Supp. 1378, 1378 (1997).
3. Employer-employee negotiations. K.S.A. 2015 Supp. 75-4319(b)(3).
  - a. May meet in executive session to discuss conduct or status of negotiations, with or without the authorized representative who is actually doing the bargaining. K.S.A. 2015 Supp. 4319(b)(3); AGO 79-125.
  - b. Cannot use this exception to meet with employees. AGO 80-43.
  - c. School boards have special rules for professional negotiations. *See* K.S.A. 72-5423(c); AGO 92-51.
4. Confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorship. K.S.A. 2015 Supp. 75-4319(b)(4).
  - a. Economic development groups. AGO 88-148.
  - b. Must be for data that is truly confidential in nature. *See* K.S.A. 60-3320(4); *Southwestern Bell Telephone Co. v. KCC*, 6 K.A.2d 444, 457 (1980), *rev. den.* 230 Kan. 819 (1981); *All West Pet Supply v. Hill's Pet*

*Products*, 840 F.Supp. 1433, 1437 (Kan. 1993).

- c. Kansas Bioscience Authority has special rules on executive sessions to discuss or consider marketing or operational strategies; may also use any other exception found in K.S.A. 2015 Supp. 75-4317 *et seq.* See K.S.A. 2015 Supp. 74-99b07(c); AGO 2011-23.
- 5. Matters affecting a student, patient, or resident of public institutions. K.S.A. 2015 Supp. 75-4319(b)(5).
  - a. Must concern a particular person, not students, patients or residents in general.
    - 1) General discussion of quality of care and staffing at county hospital not allowed in executive session. AGO 2008-22; *see also* AGO 89-22 (discussing hospital peer review and risk management reports).
  - b. Hearing must be open if requested by person involved.
  - c. Inmates are residents of institutions. AGO 80-102.
- 6. Preliminary discussions relating to acquisition of real property. K.S.A. 2015 Supp. 75-4319(b)(6).
  - a. Acquisition only, not sale of property, which must be discussed in open meeting. AGO 87-91.
  - b. This exception can be used only when the primary focus of the discussion is real property; negotiating strategy alone is insufficient. AGO 89-92.
- 7. Security measures, if open discussion would jeopardize security. K.S.A. 2015 Supp. 75-4319(b)(13).
  - a. “Security measures” are measures that protect against criminal acts intended to intimidate or coerce the civilian population, influence government policy by intimidation or coercion or to affect the operation of government by disruption of public services, mass destruction, assassination or kidnapping. They include, but are not limited to, intelligence information, tactical plans, resource deployment and vulnerability assessments. K.S.A. 2015 Supp. 75-4319(b)(13).
  - b. Any confidential records or information concerning security measures discussed in executive session are exempt from subpoena,

discovery or other action. K.S.A. 2015 Supp. 45-221(g).

8. Other subjects may be discussed in closed or executive meeting pursuant to specific statutes. *See, e.g.*, K.S.A. 2015 Supp. 75-4319(b)(7) [racing and gaming]; (b)(8) [abuse and neglect]; (b)(9) [child death review board]; (b)(11) [Medicaid drug utilization board] (b)(12) [tribal-state gaming compacts]; (b)(14) (records on matters related to child care facilities or maternity centers); (b)(15) [KHPA and inspector general discussion of investigations and audits).

D. Attendance at executive session—who can be present?

1. Only the members of a public body have the right to attend executive session. AGO 87-170 (county clerk does not have right to attend); 86-143 (members of advisory boards do not have right to attend).
  - a. Mere observers may not attend. Inclusion of general observers means the meeting should be open to all members of the public. AGO 92-56; 86-143; 82-176.
  - b. Persons who aid the public body in their discussions may be admitted to the executive session. AGO 91-31; 82-176; 80-43.
2. CAVEAT: Non-clients cannot attend executive sessions for attorney-client privileged communication. AGO 82-247.

## VII. INVESTIGATIVE AUTHORITY

A. Filing a complaint. K.S.A. 2015 Supp. 75-4320e(a).

1. Any complaint submitted to the attorney general must be on a form approved by the attorney general. The person submitting the complaint must attest to the facts under penalty of perjury. The form is located on the Office of the Attorney General website at [www.ksag.org](http://www.ksag.org).
2. Each county/district attorney establishes a procedure for filing a complaint.

B. Attorney general and county/district attorney may:

1. Subpoena witnesses, evidence, records, documents or other material;
2. Take testimony under oath;
3. Examine or cause to be examined any records or other materials relevant to the alleged KOMA violations;

4. Require attendance and take testimony under oath concerning the records or other materials;
5. Serve interrogatories; and
6. Administer oaths and affirmations.

K.S.A. 2015 Supp. 75-4320b.

B. Enforcement of Investigative Demands and Subpoena – K.S.A. 2015 Supp. 75-4320b.

1. If any person willfully fails or refuses to file a response to an investigative demand or refuses to obey a subpoena, the attorney general or the county/district attorney may apply to the district court to enforce the investigative demand or subpoena.
2. The attorney general or county/district attorney must first give notice to the person before applying to the district court.
3. After a hearing, the district court may:
  - a. Issue an order requiring a response or
  - b. Grant other relief as required until the person responds to the investigative demands or obeys the subpoena.

## VIII. GRADUATED ENFORCEMENT OPTIONS

A. Any member of a public body or agency who “knowingly” violates KOMA provisions or who intentionally fails to provide information required by K.S.A. 2015 Supp. 75-4318(b) (notice), shall be liable for payment of a civil penalty in a sum not to exceed \$500 for each violation. *See* K.S.A. 2015 Supp. 75-4320(a).

1. No requirement of specific intent to violate the law. “Knowing” violation occurs when there is purposeful commission of the prohibited acts. (*Palmgren*, 231 Kan. 524, Syl. § 10 and at 536-37).
2. The KOMA is a civil statute – not a criminal statute.

B. Consent Judgment. K.S.A. 2015 Supp. 75-4320f.

1. The attorney general or a county/district attorney may accept a consent judgment instead of filing an enforcement action pursuant to K.S.A. 2015 Supp. 75-4320a.



2. May include any remedy available to the district court but shall not include an award of reasonable expenses, investigation costs or attorney fees.
3. The district court must approve the consent judgment and enter judgment before the consent judgment is effective.
4. A breach of the consent judgment is a violation of a court order and shall be subject to penalties as provided by law.

C. Consent Order. K.S.A. 2015 Supp. 75-4320d.

1. When the attorney general determines by a preponderance of the evidence after an investigation that a public body or agency has violated the KOMA, the attorney general may enter into a consent order instead of filing an enforcement action pursuant to K.S.A. 2015 Supp. 75-4320a.
2. A consent order may:
  - a. Contain admissions of fact;
  - b. Require completion of attorney general approved training;
  - c. Impose a civil penalty of up to \$250 per person for each violation;
  - d. Set forth an agreement to comply with the KOMA; and
  - e. Require submission of proof that the requirements of the consent order have been satisfied.
3. Signature. Consent order shall be signed by:
  - a. The head of the public body or agency;
  - b. Any officer found to have violated the KOMA; and
  - c. By any other person required by the attorney general.

D. Finding of Violation. K.S.A. 2015 Supp. 75-4320d.

1. When the attorney general determines by a preponderance of the evidence after an investigation that a public body or agency has violated the KOMA, the attorney general may issue a finding of violation instead of filing an enforcement action pursuant to K.S.A. 2015 Supp. 75-4320a.
2. A finding of violation may:

- a. Contain findings of fact and conclusions of law;
- b. Require the public body or agency to cease and desist from further violations of the KOMA;
- c. Require completion of attorney general approved training;
- d. Impose a civil penalty of up to \$500 per person for each violation;
- e. Require compliance with the KOMA: and
- f. Require submission of proof that the requirements of the consent order have been satisfied.

E. District Court Enforcement of Consent Order or Finding of Violation. K.S.A. 2015 Supp. 75-4320d.

- 1. The attorney general may apply to the district court to enforce a consent order or a finding of violation. Before doing so, the attorney general shall make a demand of the public body or agency to comply with the consent order or finding of violation, and provide a reasonable opportunity to cure the violation.
- 2. Venue. The action must be filed in the district court of the county where the consent order or finding of violation is issued or effective.
- 3. District court order. If the district court finds that the attorney general did not abuse the attorney general's discretion in entering into the consent order or issuing the finding of violation, the district court shall enter an order that:
  - a. Enjoins the public body or agency to comply with the consent order or finding of violation;
  - b. Imposes a civil penalty not less than the attorney general imposed and not more than \$500;
  - c. Requires the public body or agency to pay the attorney general's court costs and costs incurred in investigating the violation; and
  - d. Any other remedy authorized by K.S.A. 2015 Supp. 75-4320a(a) that the court deems appropriate.
- 4. Attorney Fees. K.S.A. 2015 Supp. 75-4320d.
  - a. The court may require the public body or agency to pay the attorney

general's reasonable attorney fees.

- b. The court shall require the public body or agency to pay the attorney general's reasonable attorney fees if the violation was not made in good faith and without a reasonable basis in fact or law.

F. Enforcement Action

1. Any person, county/district attorney or the attorney general may bring an action. K.S.A. 2015 Supp. 75-4320.
2. Venue is in the county where the meeting was held. K.S.A. 2015 Supp. 75-4320a(a).
3. Public body bears the burden of proof to sustain its action. K.S.A. 2015 75-4320a(b).
4. Except as otherwise provided by law, KOMA enforcement proceedings brought by a county/district attorney or the attorney general have precedence over all other cases and "shall be assigned for hearing and trial at the earliest practicable date." K.S.A. 2015 75-4320a(e).
5. Remedies
  - a. Voiding action. K.S.A. 2015 75-4320(a).
    - 1) Binding action taken at a meeting not in substantial compliance with KOMA may be voided by court.
    - 2) Action to void must be filed within 21 days of the meeting where the alleged violation took place.
    - 3) Only attorney general and county/district attorney have standing to seek avoidance of governmental action based on violations of KOMA; may also bring action to seek injunctive or mandamus relief. K.S.A. 2015 Supp. 75-4320; *Stoldt*, 234 Kan. 957, ¶ 1; *Krider v. Board of Trustees of Coffeyville Community College, Montgomery County*, 277 Kan. 244 (2004); *see also Mid-Continent Specialists, Inc. v. Capital Homes, L.C.*, 279 Kan. 178 (2005).
  - b. Injunction, mandamus, or declaratory judgment can be brought by any person or by attorney general or county/district. K.S.A. 2015 Supp. 75-4320a(a); *Stoldt v. City of Toronto*, 234 Kan. 957, ¶ 1 (1984).
    - a. Injunctive relief, rather than mandamus, proper remedy to

address board of county commissioners' past KOMA violations. *Klein v. Johnson County Bd. Of County Comm'rs*, 77 P.3d 1009 (Court of Appeals, 2003) (unpublished case).

6. Penalties for violations. Penalties are civil, not criminal, in nature. K.S.A. 2015 Supp. 75-4320.
  - a. Penalties are assessed against the individual, not the public body or agency. K.S.A. 2015 Supp. 75-4320(a).
  - b. Penalty of up to \$500 for each violation as determined by the district court in actions brought by attorney general or county/district attorney. K.S.A. 2015 Supp. 75-4320(a).
  - c. Civil penalties recovered by attorney general paid to the attorney general's open government fund; civil penalties recovered by county/district attorney paid to general fund in county where proceedings instigated. K.S.A. 2015 Supp. 75-4320(b).
7. Technical violations.
  - a. Courts overlook technical violations if public body made good faith effort to comply, there was substantial compliance with KOMA, no one prejudiced, and public's right to know not effectively denied. *Stevens v. Board of Reno County Comm'rs*, 10 K.A.2d 523, 526 (1985); *see also* K.S.A. 2015 Supp. 75-4320a(a) (action taken at a meeting not in substantial compliance shall be voidable).
8. Other Consequences.
  - a. Ouster pursuant to K.S.A. 60-1205; *see also* AGO 80-168. This is a separate action which must be filed by a public prosecutor.
  - b. Recall pursuant to K.S.A. 25-4301 *et seq.*; *but see* K.S.A. 25-4302 concerning grounds for recall (felony, misconduct in office or failure to perform duties prescribed by law; "misconduct in office" defined as violation of the law that impacts the officer's ability to perform the official duties of the office); *see also* *Collins v. Hoeme*, 40 K.A.2d 93, 96 (2008) (KOMA violations sufficient for recall of elected officials).
  - c. Ouster or recall not automatic – these actions must be pursued separately.
9. Costs.
  - a. Court may award court costs to person seeking to enforce the

KOMA. K.S.A. 2015 Supp. 75-4318 or 75-4319. Unlike a civil penalty, costs are assessed against the public body or agency responsible for violation. K.S.A. 2015 Supp. 75-4320a(c).

- b. Where defendant is the prevailing party, court may award costs if it finds plaintiff maintained action frivolously, not in good faith or without a reasonable basis in fact or law. K.S.A. 2015 Supp. 75-4320a(d).
- c. Court may award to the attorney general or a county/district attorney reasonable expenses, investigation costs and attorney fees. K.S.A. 2015 Supp. 75-4320a(e)(1).
- d. Court shall award to the attorney general or a county/district attorney reasonable expenses, investigation costs and attorney fees if the violation was not made in good faith and without a reasonable basis in fact or law. K.S.A. 2015 Supp. 75-4320a(e)(2).